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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

LARRY CRUZ,	)	1:13-cv-01762-BAM (PC)
	)	
Plaintiff,	)	ORDER GRANTING PLAINTIFF’S
	)	MOTION FOR RECONSIDERATION
v.	)	(ECF No. 9)
	)	
M. ESPINOSA, et al.,	)	
	)	
Defendants.	)	ORDER VACATING JUDGMENT AND
	)	DIRECTING CLERK OF COURT TO
	)	REOPEN ACTION AND PROVIDE
	)	PLAINTIFF WITH A COPY OF THE
	)	COURT’S SCREENING ORDER
	)	
	)	
	)	

**I. Procedural Background**

Plaintiff Larry Cruz (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on November 1, 2013. On October 28, 2014, the Court screened Plaintiff’s complaint pursuant to 28 U.S.C. § 1915A, and found that Plaintiff stated a cognizable claim for violation of the Eighth Amendment against Defendants Dunn, Hiracheta, Silva and Espinosa, but failed to state any other claims. The Court directed Plaintiff to either file a first amended complaint or notify the Court that he did not wish to file an amended complaint and was willing to proceed only on the cognizable Eighth Amendment claim within thirty days from the date of service. (ECF No. 6.)

1 On December 9, 2014, after more than thirty days had passed and Plaintiff failed to  
2 respond to the Court's order, the Court dismissed the action for failure to obey a court order.  
3 (ECF No. 7.) Judgment was entered the same date. (ECF No. 8.)

4 On January 12, 2015, Plaintiff filed the instant motion for reconsideration of the order  
5 dismissing this action. (ECF No. 9.) Plaintiff submitted the motion for mailing on January 5,  
6 2015. (ECF No. 9, p. 31.)

7 **II. Motion for Reconsideration**

8 Applying the prison mailbox rule, Plaintiff filed his motion for reconsideration 27 days  
9 after entry of judgment. Douglas v. Noelle, 567 F.3d 1103, 1107 (9th Cir. 2009). A motion for  
10 reconsideration, such as that filed by Plaintiff, is treated as a motion to alter or amend judgment  
11 under Federal Rule of Civil Procedure 59(e) if it is filed within 28 days after the entry of  
12 judgment. United States v. Nutri-cology, Inc., 982 F.2d 394, 397 (9th Cir.1992); Fed. R. Civ. P.  
13 59(e).

14 Relief pursuant to Rule 59(e) is appropriate when there are highly unusual circumstances,  
15 the district court is presented with newly discovered evidence, the district court committed clear  
16 error, or a change in controlling law intervenes. School Dist. No. 1J, Multnomah County, Oregon  
17 v. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir.1993). To avoid being frivolous, such a motion must  
18 provide a valid ground for reconsideration. See MGIC Indem. Corp. v. Weisman, 803 F.2d 500,  
19 505 (9th Cir.1986).

20 Here, Plaintiff claims that reconsideration is warranted because he never received the  
21 Court's screening order dated October 28, 2014. In his declaration supporting the motion,  
22 Plaintiff reports that on September 8, 2014, he filed a "Request Update Status on Complaint"  
23 regarding this action. The Clerk of the Court sent Plaintiff a copy of the docket, which showed  
24 that Plaintiff's complaint had not yet been screened. (ECF No. 9, Pl's Dec. ¶¶ 4-5, Ex. B.)  
25 Thereafter, on December 12, 2014, Plaintiff received the Court's order that this action had been  
26 dismissed for failure to obey the Court's October 28, 2014 order. Plaintiff declares under  
27 penalty of perjury that he never received the Court's October 28, 2014 order. (ECF No. 9, Pl's  
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1 Dec. ¶¶ 6-7.) Plaintiff states that if he had received any court documents, then he would comply  
2 with court rules in a timely manner. (Id. at ¶ 12.)

3 The Court has considered Plaintiff's moving papers, and finds that they support relief  
4 under Rule 59(e) due to highly unusual circumstances. Plaintiff has represented to the Court  
5 under penalty of perjury that he did not receive the Court's October 28, 2014 screening order.  
6 Plaintiff therefore should not be penalized for failure to obey a court order that he did not  
7 receive. Accordingly, Plaintiff's motion to alter or amend the judgment shall be granted. The  
8 Clerk of the Court will be directed to vacate the entry of judgment, reopen this action and mail  
9 Plaintiff a copy of the Court's October 28, 2014 screening order. Within thirty days following  
10 service of the screening order, Plaintiff must either file a first amended complaint or notify the  
11 Court in writing that he does not wish to file a first amended complaint and he is willing to  
12 proceed only on the cognizable Eighth Amendment claim against Defendants Dunn, Hiracheta,  
13 Silva and Espinosa.

14 **III. Conclusion and Order**

15 Based on the foregoing reasons, it is HEREBY ORDERED as follows:

- 16 1. Plaintiff's motion for reconsideration is GRANTED;
- 17 2. The Clerk of the Court is directed to VACATE the judgment entered on December 9,  
18 2014, and reopen this action;
- 19 3. The Clerk of the Court shall mail Plaintiff a copy of the Court's screening order  
20 issued on October 28, 2014;
- 21 4. Within thirty (30) days from the date of service of this order, Plaintiff must either:
  - 22 a. File a first amended complaint curing the deficiencies identified by the Court  
23 in this order, or
  - 24 b. Notify the Court in writing that he does not wish to file a first amended  
25 complaint and he is willing to proceed only on the cognizable Eighth  
26 Amendment claim against Defendants Dunn, Hiracheta, Silva and Espinosa;  
27 and

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5. If Plaintiff fails to comply with this order, this action will be dismissed, without prejudice, for failure to obey a court order.

IT IS SO ORDERED.

Dated: January 23, 2015

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE